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Case No. 99-733

IN THE SUPREME COURT
OF THE UNITED STATES

BEVERLY ENTERPRISES, INC. and DONALD L. DOTSON,
Petitioners,

v.

ROSEMARY TRUMP and SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 585,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners are Beverly Enterprises, Inc., the nation's largest for-profit operator of nursing homes, and Donald L. Dotson, Beverly's Senior Vice-President for Labor and Employment. A29, ¶6; A35, ¶28. Petitioners filed two defamation actions under Pennsylvania law in the federal District Court for the Western District of Pennsylvania under its diversity jurisdiction, one against Respondent Rosemary Trump and another against Respondent Service Employees Union, Local 585. A28-53. Trump is the President of Local 585. A.28, ¶3. Local 585 represents employees at a number of Beverly's homes in Pennsylvania and the parties were involved in negotiations for new contracts governing these homes during the relevant time period. A30, ¶¶12-13.

The Complaints attempted to state claims of defamation under Pennsylvania law arising out of statements allegedly made by Local President Trump on two occasions. The first was a political rally in a park in Pittsburgh where Trump allegedly approached Dotson in the crowd and

> 31. ...ascertained that he was with Beverly;

ascertained his identity; inquired as to whether Dotson knew who she was; and became visibly upset and irate when Dotson said he did not know who she was.

32. Trump told Dotson that he should have known who she was and then identified herself as Rosemary Trump, President of SEIU Local 585. Unprovoked, she then began to berate Dotson in a loud and angry voice, easily overhead by other people nearby. Trump accused Dotson of being a "criminal" and said that "you people at Beverly are all criminals."

33. Without raising his voice, Dotson attempted to respond to Trump's loud accusations. Trump cut him off and angrily accused him of "devoting (his) entire career to busting unions."

34. Trump was resistant to reasoned discourse by Dotson in response to her accusations. She would not shut up, and she would not go away. Finally, she shouted at Dotson:

> "I know your kind. You're just part of that World War II generation that danced on the graves of Jews."

A35-36.

The second occasion was a town hall meeting convened by several members of Congress in the Allegheny County Courthouse to hear statements concerning H.R. 1624, the "Federal

Procurement and Assistance Integrity Act." A37, ¶43. During the course of Trump's statement at the meeting, Congressman Ron Klink asked her a question about Beverly and she allegedly responded, in part,

> *when President Clinton was elected and a new Chairman of the National Labor Relations was appointed, the former Chairman, Don Dotson, walked out of his federal government job and knocked on evidently the Beverly door and said, who knows more about all of your unfair labor practice cases in Beverly 1 and 2 than me since I have been supervising them on behalf of the government.*

A37-38, ¶48 (emphasis in original).

The District Court consolidated the cases and then granted Defendants' motion to dismiss solely on state law grounds. The Court dismissed the claim based on the statements in the park on the grounds that it failed to allege statements that could reasonably be understood to be defamatory because they were "mere hyperbole and insulting rhetoric...incapable of defamatory meaning as a matter of law." A15-16. The District Court dismissed the claim based on the statements at the town hall meeting on the grounds that they were entitled to an absolute

legislative witness privilege. A16-19.

The Court of Appeals unanimously affirmed the dismissal solely on state law grounds. The Court agreed with the District Court that the alleged statements in the park concerning union busting and being a criminal could not reasonably have been understood to be statements of fact and were thus nonactionable as a matter of law. A5-6. The Court upheld the dismissal of that portion of the claim based on the alleged statement concerning dancing on the graves of the Jews on the grounds that under Pennsylvania law a plaintiff must allege either defamation per se or special damages to state a claim arising out of an oral statement, i.e. a claim of slander, and Plaintiffs failed to allege either. A6-7. The Court upheld the dismissal of the claim based on the statement at the town hall meeting on the grounds that it could not reasonably have been understood to be defamatory. A9-12.

Petitioners seek review in this Court only of the rulings on their claims based on the alleged statements in the park concerning union busting and dancing on the graves of the Jews and the

alleged statement at the town hall meeting.

ARGUMENT

A writ of certiorari should not be granted in this case for three reasons. First, the courts below decided this case solely under Pennsylvania law. Plaintiffs attempted to state claims under state law. Both court below dismissed the claims based on state law. Neither court relied on or even mention any federal law defense. No federal question was addressed in the decisions below. Second, the federal questions that Petitioners attempt to raise before this Court were not raised below. Third, the federal questions that Petitioners attempt to raise before this Court have been clearly and consistently answered.

I. The Courts Below Dismissed This Case Solely Under Pennsylvania Law

The two defamation cases at issue were filed in the District Court for the Western District of Pennsylvania solely under its diversity jurisdiction. *See* A28-29, ¶4; A42, ¶5. Only state law defamation was pleaded in the complaints. *See* 35-39, ¶¶29-58; A48-52, ¶¶30-51. The District Court dismissed the consolidated

actions solely under Pennsylvania defamation law. *See* A14-19. The Court of Appeals affirmed based solely on state law. *See* A5-12.

A. The Court of Appeals upheld the dismissal of the claims based on the alleged statements concerning union busting and the solicitation of employment based on PA. CONS. STAT. §8343(a) (West 1999), which makes "the defamatory character of the communication" an element of a defamation claim. *See* A5. Following Pennsylvania law, the Court held that "'it is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit.'" A5 (quoting *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996)). Following the Pennsylvania Supreme Court's allocation of this function to the Court, the Court of Appeals held that under Pennsylvania law neither of the alleged statements was capable of conveying a defamatory meaning.

The Court of Appeals upheld the dismissal of the claim based on the alleged statement concerning union busting on the grounds that any reasonable listener would have understood it to

be mere"rhetorical hyperbole or a vigorous epithet" rather than a statement of fact. A5-6. While Petitioner states that the Court relied on *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), *see* Petition at 4, the Court actually followed the standards for dividing epithets from statements of fact established by "Courts in Pennsylvania," quoting *Kryeski v. Schott Glass Techn., Inc.*, 626 A.2d 595 (Pa.Super. 1993). *See* A6. The Court merely cited *Greenbelt* as an additional authority. *See* A6.

B. The Court of Appeals upheld the dismissal of the claim based on the alleged statement concerning the solicitation of employment on the grounds that no reasonable listener could have understood it to be an accusation that Dotson violated the Ethics in Government Act. *See* A11-12. Petitioners argued that the statement implied that Dotson sought employment with Beverly while he was employed by the National Labor Relations Board and that he offered to represent Beverly before the agency in cases he had handled or supervised while at the agency. The Court held that the alleged statement "is incapable of conveying either of the

defamatory meanings plaintiffs advance." A12.[1]

C. The Court of Appeals also upheld the dismissal of the claim based on the alleged statement about dancing on the graves of the Jews on purely state law grounds. Again, relying on Pennsylvania's codification of the elements of a slander claim, the Court concluded that the elements of a slander claim in Pennsylvania include special damages unless slander per se is alleged. A6. The Court then concluded that the Complaint failed to allege either slander per se or special damages. A7.[2]

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[1] Petitioners incorrectly state that the Court of Appeals upheld the dismissal of this claim on the grounds that the Complaint did not allege either slander per se or special damages. Petition 6-7. Petitioners also fault the Court of Appeals for not considering other potentially defamatory meanings of the alleged statement. Petitioner at 19 n. 5. But as the Court of Appeals clearly and correctly held, Petitioners advanced only two potentially defamatory meanings and the Court held that the alleged statement could not reasonably have been understood to convey either.

[2] Petitioners incorrectly state that the Court of Appeals held that the statement was capable of a defamatory meaning. Petitioner at 5, 26. The Court of

(continued...)

The District Court dismissed the state law slander claims solely on state law grounds. The Court of Appeals upheld the dismissal of the state law slander claims on purely state law grounds. The decisions below do not raise a federal question.

II. Petitioners Did Not Raise The Federal Questions They Attempt To Raise Before This Court Below

Petitioners attempt to raise three federal questions before this Court. However, none of the questions was raised below.

A. The first question Petitioners attempt to raise is whether the First Amendment somehow requires courts to analyze whether an allegedly defamatory statement contains statements of fact capable of being proven false before concluding that the statement is nonactionable rhetorical hyperbole. In the District Court and the Court of Appeals, however, while Petitioners argued that the alleged statements could reasonably have been understood to be statements of fact, they did not argue that the First Amendment somehow imposed a burden on the District Court or the Court of

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[2] (...continued)
Appeals did not reach this question because it held that the Complaint failed to allege either defamation per se or special damages. A6-7.

Appeals to conduct a particular form of analysis before concluding otherwise. Thus the District Court and the Court of Appeals did not address the First Amendment in any way before concluding that the statement about union busting was nonactionable rhetorical hyperbole under Pennsylvania law.

B. The second question Petitioners attempt to raise is whether the First Amendment somehow prohibits courts from construing the elements of a defamation claim under state law to include elements not required by the First Amendment when the claim is made by a public figure. In the District Court and the Court of Appeals, however, while Petitioners argued that the elements of a slander claim under Pennsylvania law do not include special damages, they did not argue that the First Amendment somehow prevented the District Court or the Court of Appeals from so reading Pennsylvania law. Neither the District Court nor the Court of Appeals found that Dotson was a public figure. Neither the District Court nor the Court of Appeals even mention public figure doctrine. In fact, the District Court and the Court of Appeals did not address the First Amendment in any way. The

Court of Appeals simply concluded that the slander claim based on the alleged statement about dancing on the graves of the Jews was insufficient under Pennsylvania law because it did not allege either defamation per se or special damages.

C. The final question Petitioners attempt to raise is whether this Court's decision in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), somehow prohibits states from including elements in all claims of defamation that were not mandated in *Linn* for claims arising out of labor disputes. In the District Court and the Court of Appeals, however, while Petitioners argued that the elements of a slander claim under Pennsylvania law did not include special damages, they did not argue that this Court's decision in *Linn* somehow prevented the Court from so reading Pennsylvania law. In fact, Petitioner's argued in the Court of Appeals that "Appellee Trump's Statements About Dotson At The Dole/Kemp Rally Did Not Arise In The Context Of A Labor Dispute." Brief at 45. Thus the Court of Appeals did not address *Linn* in any way before concluding that the slander claim based on the alleged statement about dancing on the graves of the Jews was defective under

Pennsylvania law because it did not allege defamation per se or special damages. In fact, neither court below even cited *Linn* in its opinion.

The federal questions Petitioners attempt to raise before this Court were not raised before either the District Court or the Court of Appeals.

III. The Questions Petitioners Attempt To Raise Have Been Clearly And Consistently Answered

The questions Petitioners attempt to raise before this Court have been clearly and consistently answered. This is because, in each instance, Petitioners attempt to turn the protections of federal law on their head, arguing that the First Amendment and the National Labor Relations Act protect not "freedom of speech," U.S. Const., amend. I, or the "free discussion envisioned by the [National Labor Relations] Act," *Linn*, 383 U.S. at 65, but rather reputation. This Court has recognized that the "legitimate state interest underlying the law of libel" must be balanced against the freedom of speech protected by the First Amendment and it has recognized that "a State's concern with redressing malicious libel

is 'so deeply rooted in local feeling and responsibility' that it fits within the exception [to federal labor law preemption]." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Linn*, 383 U.S. at 62. But this Court has never suggested in any manner that either the United State Constitution or the National Labor Relations Act prevent a state or a court construing state law from limiting the protection of reputation available under state law. Rather, this Court has held that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood." *Gertz*, 418 U.S. at 345-46. While up to now, the First Amendment and the National Labor Relations Act have been construed to limit the circumstances in which damages can be recovered based on speech alone, Petitioners argue that the First Amendment and National Labor Relations Act limit the pleading requirements a state can uniformly impose on all plaintiffs alleging defamation. The questions raised by Petitioners do not merit Supreme Court review.

A. Applying only Pennsylvania law, the Court of Appeals held that the alleged statement that Dotson had devoted his entire career

to busting unions was not an actionable statement of fact. The Court concluded, "the reasonable listener would recognize this statement as merely a vituperative outburst which, although undoubtedly offensive,...is not actionable in defamation." A6.[3]

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[3] Contrary to Petitioner's suggestion, the Court of Appeals considered all the allegations in the Complaint concerning both the content and context of the alleged statement before holding it was nonactionable. The Court noted that the Complaint alleged that Trump identified herself as the president of a labor union, was "visibly upset," spoke in a "loud and angry voice," and uttered not one but a stream of insults. A4. These facts amply support the Court's conclusion. The Restatement (Second) of Torts (1977) is directly on point:

> A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the

(continued ..)

The Court of Appeals did not misapply "constitutional defamation doctrine" as argued by Petitioners because it did not apply any constitutional doctrine. While Petitioners present an extensive analysis of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and its progeny, the Court of Appeals did not even cite *Milkovich*.

This Court's constitutional defamation doctrine limits state law defamation claims in order to protect speech under the First Amendment. Thus, in *Milkovich*, the lower court held that "the article in question was constitutionally protected opinion." *Id.*, at 10. This Court granted review to "consider the important questions raised by the Ohio courts' recognition of a constitutionally required 'opinion' exception to the application of defamation laws." *Id.* In contrast, the Court of Appeals' decision in this case held the speech nonactionable solely under state law.

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[3] (...continued)

fact that the plaintiff is of illegitimate birth but only to be abusing him to his face.

Id., §566, at 176. Pennsylvania courts have a "general tendency to follow the Restatement." *Agriss v. Roadway Exp., Inc.*, 483 A.2d 456, 473, 334 Pa.Super. 295 (1984).

The decision neither threatens First Amendment protections nor misapplies them. The First Amendment is simply beside the point in this case.

Moreover, even if the Court of Appeals had relied on constitutional doctrine, its decision is wholly consistent with *Milkovich*. While this Court made clear in *Milkovich* that "expressions of 'opinion' may often imply an assertion of objective fact," it also made clear that the "[*Greenbelt Cooperative Publishing Assn., Inc. v.] Bresler*[, 398 U.S. 6 (1970),] -- *Letter Carriers [v. Austin*, 418 U.S. 264 (1974),] -- [*Hustler Magazine v.] Falwell*[, 484 U.S. 46 (1988),] line of cases [still] provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual.... This provides assurance that public debate will not suffer for lack of 'imaginative expression' or 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.*, at 22. The "dispositive question," according to this Court in *Milkovich*, is "whether a reasonable fact finder could conclude that the statements...imply an assertion [of fact]." *Id.*, at 21. This is

precisely the question both the District Court and the Court of Appeals posed and answered in the negative.

B. Again, applying only Pennsylvania law, the Court of Appeals held that the claim based on the alleged statement concerning dancing on the graves of the Jews was insufficient because it alleged neither defamation per se nor special damages. The Court of Appeals' decision does not "conflict with the Pennsylvania Supreme Court on an important question of federal law regarding the protections available to defendants under the First Amendment in public figure defamation actions" as argued by Petitioners because the Court of Appeals did not rely on the protections available to defendants in defamation actions brought by public figures. Petitioners simply misstate the holding below when they state that "the Third Circuit's decision imposes an additional burden on public figure libel plaintiffs in Pennsylvania." Petitioner at 17. In fact, the Third Circuit's decision merely held that this "additional burden" exists for *all* plaintiffs alleging slander under Pennsylvania law. The Court of Appeals did not hold that Dotson was a public figure and did not even cite any of

the public figure jurisprudence. Rather, the Court held that under Pennsylvania law all plaintiffs alleging slander must plead either defamation per se or special damages regardless of the identity of the plaintiff.[4] The holding was in no way limited to public figures or based on Dotson being a public figure. Petitioners' argument that the First Amendment somehow prevents the states from including elements in all claims of slander that are not required to avoid violating the First Amendment in a public figure case is without foundation.[5]

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[4] The Court of Appeals based it decision on the Pennsylvania law of slander not the Pennsylvania Constitution. Thus Petitioner's argument that the Court's decision conflicts with the Pennsylvania Supreme Court's decision holding that the State Constitution provides no more protection for defendants in defamation actions than the federal Constitution is inapposite.

[5] Petitioners argue that the Court of Appeals' decision conflicts with Pennsylvania law on the grounds that the statement at the town hall meeting was libel and not slander because the town hall meeting was televised. However, this argument is beside the point because the Court of Appeals relied on the requirement of pleading either defamation per se or special damages only in

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[5] (...continued)
upholding the dismissal of the claim based on the alleged statement concerning dancing on the graves of the Jews. The Court upheld the dismissal of the claim based on the alleged statement at the town hall meeting on the grounds that the statement could not reasonably have been understood to be defamatory. A12.

Moreover, Petitioners did not make this argument below. The parties addressed this question in post-argument letters invited by the Court during argument. Defendants argued that while Pennsylvania had eliminated the per se/per quod distinction in libel cases, the State had maintained the distinction in slander cases. In response, Plaintiffs argued only that the "complaint...properly alleges slander per se" and that "the slander per se -- per quod distinction...has no continuing validity in modern defamation law." January 8, 1999 letter to P. Douglas Sisk, Clerk at 2, 4. Moreover, Plaintiffs argued that the Pennsylvania court's rationale in libel cases "applies with equal force to modern slander actions." *Id.*, at 5. Plaintiffs never argued that this was a libel case and did not even cite the three cases cited in their Petition to this Court to support their argument that televised broadcasts are libel not slander.

Finally, Petitioners are simply wrong. The most recent Pennsylvania case they cite, *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (1987), does not address the issue. There is only dicta in the second case they cite, *Schonek v. WJCA, Inc.*, 436 Pa. 6, 258 A.2d 504, 506 (1969). And the (continued...)

C. Similarly, the Court of Appeals' decision is not "contrary to Supreme Court doctrine on labor dispute defamation" as argued by Petitioners because the Court of Appeals did not rely on the federal law protections available to speakers in labor disputes. Again, Petitioners simply misstate the holding below when they state that "the Third Circuit held that, under Pennsylvania law, in addition to meeting the *Linn* requirements, a plaintiff defamed

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[5] (...continued)
final case they cite, *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963), states, again in dicta, that "the common law distinction between [slander and libel is] not...applicable to the law of radio." *Id.*, 191 A.2d at 666. *Purcell* cites *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939), which distinguishes a radio broadcast from a print publication at considerable length. *Id.*, 8 A.2d at 310-11. Thus there is no Pennsylvania decision on point. Moreover, the three cited cases were all brought against broadcasters and the Restatement suggests that "the broadcaster" should be placed "upon the same footing as the publisher of a newspaper." Section 568A at 182. Defendants in this case were, however, not the broadcaster of the meeting. No Pennsylvania court has held that the fact that an oral statement in a public forum is captured on film by another party renders the speaker subject to a libel rather than a slander action.

during the course of a labor dispute must also plead and prove an additional element." Petition at 27. In fact, the Third Circuit's decision merely held that this "additional element" must be pleaded and proved by *all* plaintiff alleging slander under Pennsylvania law. The Court did not find that the action arose out of a labor dispute as defined in *Linn*. The Court did not even cite *Linn* in its opinion. The Court of Appeals did not hold that a plaintiff alleging defamation in an action arising out of a labor dispute must plead either defamation per se or special damages because the action arose out of a labor dispute. Such a holding would arguable have been preempted by federal law as an effort on the part of the State to regulate labor relations. Rather, the Court of Appeals held that plaintiffs alleging slander in all actions under Pennsylvania law must allege either defamation per se or special damages.

Petitioners' argument that this general requirement of pleading under Pennsylvania law somehow conflicts with *Linn* is baseless. *Linn* simply requires that plaintiffs in defamation actions arising out of labor disputes plead and prove actual malice in order

to avoid federal preemption. Federal labor law is wholly unconcerned with the reputational interests of defamation plaintiffs. If a state wishes to impose an additional element of pleading and proof on such plaintiffs regardless of whether the alleged defamation arose out of a labor dispute, federal labor law is not implicated. *Linn* in no way suggests that the state law of defamation must in every other respect be uniform. The law of defamation varies considerably state by state and this Court has never suggested that this variation is inconsistent with federal labor law. In fact, the defamation per se/defamation per quod distinction is a venerable one existing in many states and no court has ever suggested it is inconsistent with federal labor law. *Linn* balances the federal interest in unrestricted speech in labor disputes with the states' interest in protecting the reputations of their citizens. *Linn* cannot be read to require states to protect the reputational interests of their citizens in a uniform manner. *Linn* "dealt...solely with the degree to which state remedies have been pre-empted by the [National Labor Relations] Act." *Id.*, at 67. In no respect did this Court mandate state remedies as argued by

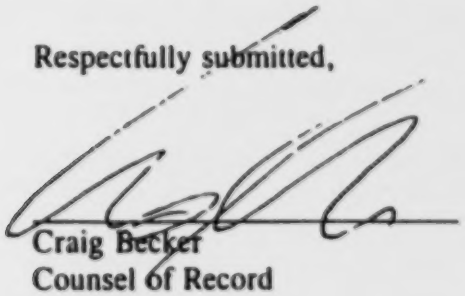
Petitioners.

The questions Petitioners attempt to raise in this Court do not merit review.

CONCLUSION

For the above-stated reasons, this Court should deny the petition.

Respectfully submitted,



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